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In the Supreme Court of the United States

OCTOBER TERM, 1993

ED PLAUT, ET AL., PETITIONERS

v.

SPENDTHRIFT FARM, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, which provides for the reinstatement of certain private securities suits that were dismissed as untimely under *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), violates the Constitution.

(I)

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No. 93-1121

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-30a) is reported at 1 F.3d 1487. The opinion of the district court (Pet. App. 31a-39a) is reported at 789 F. Supp. 231.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1993. The petitions for rehearing were denied on October 14, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on January 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1987, petitioners filed a private securities fraud suit in the Eastern District of Kentucky. The complaint stated claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (Exchange Act), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, as well as pendent state law claims. Pet. App. 31a-32a.

At the time the suit was filed, the Exchange Act did not contain a statute of limitations expressly applicable to claims under Section 10(b) or Rule 10b-5. In the absence of an express federal statute of limitations, the Sixth Circuit, like a number of other courts of appeals, had held that private Rule 10b-5 actions were subject to limitations periods borrowed from state law. See, e.g., *Carothers v. Rice*, 633 F.2d 7, 8-9 (1980), cert. denied, 450 U.S. 998 (1981).

On June 20, 1991, while the suit was pending before the district court, this Court issued its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991). *Lampf* holds that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e). Under that provision, a suit may not be brought more than one year after the fraud is discovered or more than three years after it occurs. 111 S. Ct. at 2782. On the same day that *Lampf* was decided, this Court also decided *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), in which it disapproved the use in civil litigation of "selective prospectivity"—the practice of applying a new judicial interpretation of the law in the case in which it is announced but not applying it to other pending suits.

This Court applied *Lampf*'s holding adopting a federal limitations period for Section 10(b) actions to the parties in *Lampf* itself. See 111 S. Ct. at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting). As a result, under *Beam*, the new limitations period adopted in *Lampf* became applicable to all other pending private Rule 10b-5 actions. In August 1991, relying on *Lampf* and *Beam*, the district court dismissed petitioners' federal securities claims as time-barred and entered final judgment against petitioners. Petitioners did not appeal the judgment, and the time for appeal expired in September 1991. Pet. App. 5a, 32a.

2. Effective December 19, 1991, four months after the dismissal of the federal securities claims in this case, Congress enacted legislation adding Section 27A, 15 U.S.C. 78aa-1 (Supp. IV 1992), to the Exchange Act. See *Federal Deposit Insurance Corporation Improvement Act of 1991*, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Section 27A applies to private Rule 10b-5 actions that were commenced on or before June 20, 1991, the date that *Lampf* was decided. Subsection (a) of Section 27A provides that the limitations periods for such pre-*Lampf* suits shall be the limitations periods that had prevailed in the particular jurisdiction before *Lampf*. 15 U.S.C. 78aa-1(a) (Supp. IV 1992). Subsection (b) of Section 27A provides for the reinstatement of pre-*Lampf* suits that were dismissed as time-barred under *Lampf* but were timely under the particular jurisdiction's pre-*Lampf* rules. 15 U.S.C. 78aa-1(b) (Supp. IV 1992). Subsection (b) required motions for reinstatement to be filed within 60 days of the enactment of Section 27A. 15 U.S.C. 78aa-1(b) (Supp. IV 1992).

Petitioners moved to reinstate their claims pursuant to subsection (b) of Section 27A on February 11, 1992, within the prescribed 60-day period. Pet. App. 5a. In

April 1992, the district court denied the reinstatement motion. The court acknowledged that petitioners satisfied the statutory requirements for reinstatement under subsection (b), but held that subsection (b) violates the separation of powers doctrine and the Due Process Clause. Pet. App. 33a-39a.

3. Petitioners appealed from the denial of their reinstatement motion, and the United States intervened, pursuant to 28 U.S.C. 2403, to defend the constitutionality of subsection (b) of Section 27A.¹ The court of appeals affirmed, agreeing with the district court that subsection (b) violates the separation of powers doctrine. Pet. App. 5a-27a. The court of appeals did not resolve the constitutionality of subsection (b) under the Due Process Clause. Pet. App. 14a n.12.

ARGUMENT

The court of appeals' holding that Section 27A(b) of the Exchange Act is unconstitutional conflicts with *Pacific Mutual Life Ins. Co. v. First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993). On January 10, 1994, this Court granted certiorari in *First Republicbank* to resolve the conflict and settle the constitutionality of Section 27A(b). *Morgan Stanley & Co. v. Pacific Mutual Life Ins. Co.*, No. 93-609. The Court's decision in *Morgan Stanley & Co.* should control the disposition of this case. We therefore suggest that the Court hold the petition in

¹ When the constitutionality of an Act of Congress "affecting the public interest" is called into question in a federal suit to which the United States is not a party, 28 U.S.C. 2403(a) directs the court to "permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality."

this case pending the decision in *Morgan Stanley & Co.* and then dispose of it accordingly.²

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Morgan Stanley & Co. v. Pacific Mutual Life Ins. Co.*, No. 93-609, and disposed of in accordance with the decision in that case.

Respectfully submitted.

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² Petitioners also suggest (Pet. 7-8) that the decision in this case conflicts with decisions of other courts of appeals regarding the constitutionality of subsection (a) of Section 27A, 15 U.S.C. 78aa-1(a). That suggestion is incorrect. This case is governed solely by subsection (b), and the court of appeals therefore had no occasion to resolve the constitutionality of subsection (a). See Pet. App. 6a n.5. The Sixth Circuit is currently considering the constitutionality of subsection (a) in a different case, *Freeman v. Laventhal & Horwath*, Nos. 92-6123 & 92-6191 (argued Sept. 20, 1993).